No. 89-1255

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., AND THE HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC.
Petitioners

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April 6, 1990

STATEMENT OF QUESTIONS PRESENTED

Whether the Interstate Commerce Commission properly decided that tariffs containing inadvertence clauses are not per se illegal.

Whether the Interstate Commerce Commission has authority to permit interstate motor carriers of property to maintain within their tariffs, provisions which specify a limitation of their liability where the shipper has inadvertently failed to select from among the liability limitations offered by the involved tariff provisions.

LIST OF PARTIES

The following is a list of all parties to the proceeding in the court below:

National Small Shipments Traffic Conference, Inc.
The Health and Personal Care Distribution Conference, Inc. (formerly named Drug and Toilet Preparation Traffic Conference, Inc.)
Interstate Commerce Commission
United States of America
National Freight Claims and Security Council of American Trucking Associations
National Motor Freight Traffic Association, Inc.
Roadway Express, Inc.

Petitioners, as named on the cover hereof, have no parent companies, subsidiaries or affiliates.

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Interstate Commerce Commission Decisions:

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OPINION AND DECISION BELOW

The opinions and decisions delivered in the courts below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

Interstate Commerce Act:

49 U.S.C. §10701 **Standards for rates, classifications, through routes, rules and practices**

(a) A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable. A through route established by such a carrier (including a rail carrier) must be reasonable. Divisions of joint rates by those carriers (including rail carriers) must be made without unreasonable discrimination against a participating carrier and must be reasonable.

49 U.S.C. §10730. Rates and liability based on value

(b)(1) Subject to the provision of paragraph (2) of this subsection, a motor common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title or a freight forwarder may, subject to the provisions of this chapter (including, with respect to a motor carrier, the general tariff requirements of section 10762 of this title), establish rates for the transportation of property (other than household goods) under which the liability of the carrier or freight forwarder for such property is limited to a value established by written declaration of the shipper or by written agreement between the carrier or freight forwarder and shipper if that value would be reasonable under the circumstances surrounding the transportation.

49 U.S.C. §10762. General Tariff Requirements

(d)(1) The Commission may reduce the notice period of subsections (a) and (c) of this section if cause exists. The Commission may change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances.

49 U.S.C. §11707 Liability of common carriers under receipts and bills of lading

(a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II or IV of chapter 105 of this title and a freight forwarder shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier or freight forwarder and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II and IV are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property...

(c)(1) A common carrier and freight forwarder may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, rule, or tariff filed with the Commission in violation of this section is void.

(c)(4) A common carrier may limit its liability for loss or injury of property transported under section 10730 of this title.

STATEMENT OF THE CASE

The petitioners are challenging the affirmance by the United States Court of Appeals for the Third Circuit of the Interstate Commerce Commission's denial of their request that any provisions known as "inadvertence clauses" be ordered expunged from tariffs of certain motor common carriers subject to its jurisdiction. The "inadvertence clauses" or so-called "automatic releases" specify a means of rating shipments under provisions which limit the carrier's liability, even though the shipments have been mistakenly tendered by the shipper and accepted by the motor carrier without the shipper's specific declaration of value on the bill of lading.

The Court, in upholding the I.C.C.'s determination, found that it was based on a permissible construction of involved sections of the Interstate Commerce Act (49 U.S.C. §§11707 and 10730). Moreover, it found that the "Commission's decision on inadvertence clauses was within its discretion to address as a function of filling the gaps of Congressional authorization [over released rates]." (See the decision as reproduced in Petitioner's Appendix A p. A-12).

The petitioners contend that the inadvertence clause is per se unlawful because in countermands alleged statutory requirements of 49 U.S.C. §§11707

and 10730(b) i.e., that any limitation of the carrier's liability must be predicated upon a separate written declaration of value by the shipper.

The Third Circuit rejected this argument explaining (at p. A-8) that:

> The I.C.C. determined, and we agree, that a bill of lading taken together with a filed tariff containing an inadvertence clause, can constitute a written agreement between the carrier and shipper.

As will be demonstrated herein, the court's determination reflects the clear weight of judicial precedent.

Where an inadvertence clause is applicable, a separate shipper declaration of value on the bill of lading, although helpful and, in fact, required by the terms of the bill, is not a condition precedent to the carrier's liability limitation. To appreciate this, it is important to recognize first of all that the bill of lading constitutes the contract of carriage between the shipper and carrier. Prominently placed on the Uniform Bill of Lading/Contract 1/ is the statement:

> RECEIVED subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

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1 The Uniform Bill of Lading is published in a motor carrier tariff known as the National Motor Freight Classification and is applicable for all of the carrier participants in this tariff - including the 10 motor carriers specifically named in the petitioners' complaint to the I.C.C.

The Classification and tariffs of which the Bill of Lading speaks comprise the carrier's notice to the world as to its price and service offerings. The I.C.C. and the courts have frequently recognized that:

> A shipper is charged with notice of the terms and conditions - including those affecting liability - contained in a tariff filed with the Commission. Drug & Toilet Preparation Traffic Conf. v. U.S. 797 F. 2d 1054, 1061 (D.C. Cir, 1986)

The tariff provisions at issue in this proceeding are known in the industry as "released rates" provisions inasmuch as they serve to limit the carriers' liability for loss or damage to the goods they transport. If no such limited liability or released rates provision is applicable, the carrier would be statutorily liable for the full amount of any loss or damage to the property.2/

Under principles long established by the Interstate Commerce Commission, the release of a carrier's statutory liability must be predicated upon a quid pro quo, namely the shipper's obtaining a reduction in the rates which would otherwise apply if the carrier incurred full liability. Normally, released rates provisions allow the shipper to select from among

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2 Under 49 U.S.C. §11707(a)(1) full liability is imposed on: (1) the receiving carrier; (2) the delivering carrier; or (3) another carrier over whose line or route the property is transported...

several valuations or liability limitations on the property tendered for transportation.3/

The Uniform Bill of Lading includes a Note, prominently displayed, which serves as a reminder that where the rate is dependent on value, (for example, where a released rates provision is applicable) the shipper is required to state specifically in writing the agreed or declared value of the property4/ in the blanks provided for this purpose on the form.

The inadvertence clause is a part of some, but not all, released rates provisions. Where a shipper has failed to make the required selection from among several available liability limitations, this clause operates to mandate the application of one of these options.5/

Inadvertence clauses are often used to protect the carrier where it has concluded that the commodity is of such high value that full liability would pose an

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3 (the liability limitations are usually stated in dollars or fractional dollars per pound). The valuations which provide the lowest carrier liability also are associated with the lowest rates and ratings. Thus, the shipper is offered less protection for loss or damage to its products, but the applicable rate is lower.

4 This in sharp contrast to the petitioners' erroneous contention (Pet. For Cert. at p. 7) that under the bill of lading the shipper is invited to insert a value if he wants to declare or release the value of a shipment.

5 Petitioners (Pet. For Cert. at p. 8) erroneously contend that the inadvertence clause always applies to the lowest valuation. In fact the highest valuation is usually applied. Item 116032 was developed to apply to the lowest valuation as an accommodation to the shippers.

unacceptable risk of loss.6/

Contrary to Petitioners' allegations (Pet. For Cert. p. 14), inadvertence clauses do not represent a new phenomenon. The Interstate Commerce Commission as well as the courts, has recognized the utility, legality and enforceability of these provisions for over 30 years. (See Appendix A.)

SUMMARY OF ARGUMENT

Petitioners advance two reasons for granting the writ i.e., (I) that the Third Circuit decision has raised an important legal question and (II) that there is disagreement among the circuits as to the issue decided. Neither of these will withstand scrutiny. In fact, the challenged decisions of the Interstate Commerce Commission and the Third Circuit are well founded and are in accord with the clear weight of applicable precedent.

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6 Stated differently, these clauses are used as part of the tariff provisions applicable on a particular commodity where the carrier has determined that it can afford to provide service on the commodity only if its liability is limited. Additionally, the inadvertence clause solves a difficult problem which arises where, due to human error, a shipment moving on a released rates item is inadvertently picked up by the carrier without the specified written release by the shipper. If the released rates provision does not apply, and the carrier's tariff does not include an alternative full value provision, there may be difficulty in rating the shipment. Finally, the inadvertence clause allows both parties to contract on a reasonable limit for the carrier's liability. [Shippers National Freight Claim Council v. I.C.C., 712 F.2d 740, 749 (1983)]

In contrast, the arguments of the petitioners are based on a misconception of the purpose and function of the inadvertence clause and the governing legal precedent. Petitioners begin with the erroneous premise that, until this decision, a "shipper of freight had been secure in the knowledge that under 49 U.S.C. §11707 and §10730, unless it made a written declaration of value on the bill of lading, it would be recompensed for the full value of any freight lost and damaged in transit." This allegation fails to recognize that for over 30 years, inadvertence clauses have been accepted and approved by the I.C.C. as a way in which carriers can insure that their liability will be limited, even if the shipper fails to provide the requisite declaration of value. Contrary to petitioners, where an inadvertence clause is applicable, the shipper has never had the option of electing whether or not to limit the carrier's liability, nor has a shipper's affirmative declaration of value been a prerequisite to the limitation of the carrier's liability.

The bill of lading, as the applicable contract of carriage, provides clear notice to the shipper that the tendered shipment will be subject to all of the carrier's tariff provisions - including any pertinent inadvertence clauses.

Further, it is well settled that shippers are charged with knowledge of the provisions under which they ship [Drug & Toilet Preparation Traffic Conf., Inc. v. United States 797 F.2d 1054, 1058 (D.C. Cir. 1986)]. Consequently, the shipper's signature or other assent to the terms and conditions of the bill of lading constitute its agreement to the liability

lading constitute its agreement to the liability limitation imposed by the pertinent tariff provisions - including the inadvertence clauses.

Petitioners also fail to recognize that in the Second Cummins Amendment, (Act of August 9, 1916, Ch. 301, 31 Stat. 441) enacted at the urging of the I.C.C., as part of the Interstate Commerce Act, Congress gave the Commission very broad discretion over released rate matters. And it exempted from normal "Carmack" liability, commodities which are encompassed by released rate tariff provisions filed subject to the I.C.C.'s supervision and in accord with its requirements. The I.C.C.'s "untrammeled" authority over released rates has been clearly recognized in judicial decisions spanning the last 75 years.

Finally, with one exception, the cases relied on by petitioners are not relevant in that they merely cite the general principle that a carrier is liable, absent the shipper's affirmative release; but they do not include consideration of the inadvertence clause which, as indicated, provides a recognized exception to the general principle. The decisions which do consider the effect of inadvertence clauses strongly favor the enforceability of these provisions and are in accord with the Third Circuit's decision herein being challenged.

REASONS FOR DENYING THE WRIT

I. THE I.C.C. ACTED WELL WITHIN ITS STATUTORY AUTHORITY

The petitioners' argument, that this proceeding raises an important legal question, is grounded upon a basic misconception as to the purpose and function of released rates provisions in general and the inadvertence clause in particular, as well as a misreading of the governing precedent in this area. For example, petitioners erroneously contend that "under 49 U.S.C. §10730, the shipper of freight had been secure in the knowledge that, unless it made a written declaration of the value on the bill of lading, it would be fully recompensed for loss and damage in transit" (Pet. For Cert. p. 6). This allegation fails to recognize that for over 30 years, inadvertence clauses have been accepted and approved by the I.C.C. as part of the motor carriers' released rates tariffs. The I.C.C.'s denial of petitioners' complaint was therefore clearly in keeping with its long standing precedent.

Petitioners cite the decision in Released Rates Order MC-1 (RRO MC-1), where the Commission required a specific shipper declaration of value. They argue that this requirement exemplifies the I.C.C.'s correct reading of the statute. This argument misses the mark. Contrary to petitioners, the I.C.C.'s requirement in Released Rates Order MC-1 doesn't provide a clue as to its conclusions regarding the legality of inadvertence clauses. The lack of authority for an inadvertence clause in RRO MC-1 merely

illustrates that when applying for released rates authority, the carriers didn't request such an inadvertence clause as a part of their application. There are other instances where the I.C.C. refused to permit an inadvertence clause if it concluded that the clause would not be appropriate for the particular commodities named.

In fact, the released rates orders which do include authorization for inadvertence clauses also typically include the very same language quoted by petitioners from RRO MC-1 (see Pet. For Cert. pp. 14, 15), i.e. which require the shipper to provide a release in a specified form (See Appendix A). The inadvertence clause applies where the shipper fails to make the required certification.

Petitioners (Pet. For Cert. at p. 14) cite several cases which, they contend, demonstrate that, prior to this case, the Commission has uniformly required a liability limitation to be predicated on an affirmative specification by the shipper of a released valuation on the shipping order or the bill of lading. The decisions cited by the petitioners are as follows: Released Rates Rules -- National Motor Freight Classification, 316 ICC 499, 512-13 (1962); Released Rates -- Small Shipments Tariff, 361 ICC 405, 413 (1979); and Transconex Inc. -- General Commodities, unpublished decision served November 15, 1982, affirmed without opinion, Drug and Toilet Preparation Traffic Conference v. I.C.C., No. 83-1587 (D.C. Cir. 1984).

Far from demonstrating a uniformity in the I.C.C.'s prior decisions, these cases merely reveal that the Commission has reviewed released rates applications

on a case-by-case basis and in some instances it has exercised its discretion to deny applications which include an inadvertence clause - i.e. under certain circumstances and with respect to certain commodities. Moreover, it should be noted that in all three of the cases referenced by petitioners, the applicant is seeking a blanket liability limitation applicable on general commodities rather than a narrowly drawn liability limitation on a specific commodity. In fact, with respect to Released Rates Rules -- National Motor Freight Classification, Supra, the Commission's denial of the initial applications, on the basis that it didn't have authority to grant the requested liability limitation, was overruled by the United States District Court for the Eastern District of Virginia in Southern Railway v. United States, 194 F. Supp. 633, 636 (1961). The court held that, in view of the I.C.C.'s untrammeled authority over released rates, the Commission could permit virtually whatever liability limitation provision it deemed appropriate. On reconsideration, the I.C.C. determined that the applicants had not made a strong enough showing to justify the sought blanket released rates authority, and denied the application on that basis.

Contrary to petitioners' argument, the fact that the I.C.C. has chosen to approve some inadvertence clauses while rejecting others merely confirms the wisdom of the Congress in passing the Second Cummins Amendment. This amendment gave the Commission broad discretion over released rates provisions in recognition that such authority could not be properly legislated by a statutory rule. Rather,

released rates applications need to be considered and granted on a case-by-case basis in view of the circumstances of the transportation involved -- an appropriate task for the I.C.C. as the expert administrative agency with jurisdiction over such matters.

Petitioners are also clearly mistaken in arguing that even where inadvertence clauses are applicable, shippers still have the option of defeating the specified liability limiting provisions by simply electing not to select from among the several valuations provided by the applicable released rates item (Pet. For Cert. pp. 8, 12). This would defeat the purpose of the inadvertence clause.

While Petitioners contend that carriers are forbidden to limit their liability through tariff provisions (Pet. For Cert. p. 9), the released rates tariff provision is, in fact, the only way in which the statute permits the motor common carriers to limit their liability. The petitioners' logic is based upon the erroneous presumption that the inadvertence clause would allow the carrier to unilaterally limit its liability, leaving the shipper at the carrier's mercy (Pet. For Cert. p. 7). This argument ignores the Commission's role of protecting the public interest by reviewing released rates provisions in the tariffs of motor common carriers. Under 49 U.S.C. §10730(b), released rates publications are subject to all of the requirements of subchapter II of Chapter 105 of the Interstate Commerce Act, including the requirement spelled out in §10701, that all aspects of the tariff

provision - including the liability limitation - be reasonable under the circumstances surrounding the transportation. Further, §10730(b) provides that the Commission may require the carrier to also publish a full value rate for such service. Consequently, rather than having the shipper at their mercy by being at liberty to publish any liability limitation they choose, the carriers' released rates publications - including the inadvertence clauses - are subject to the scrutiny of the I.C.C.

II. THE THIRD CIRCUIT'S DECISION RECOGNIZES THE ICC'S BROAD DISCRETION OVER RELEASED RATES

Petitioners are equally misguided in arguing that the language of §§ 11707 and 10730 clearly forbids inadvertence clauses and that these provisions serve to defeat the Congressional intent. Contrary to this argument, the Third Circuit (Pet. App. p. 6) found that:

> "neither the plain language, and its legislative history, nor the case law interpreting these sections is clear. Accordingly, we are required to determine whether the agency's answer is based on a 'permissible interpretation' of the statute." Chevron USA, Inc. v. NRDC Inc., 467 at 843 (1984)

The legislative history of §§11707 and 10730 clearly demonstrates that when it enacted the Second Cummins Amendment at the urging of the Interstate

Commerce Commission, Congress entrusted the Commission with very broad discretion over the matter of released rates. For example, the Senate Report which accompanied this legislation clarified that the Amendment was intended to exempt the carriers from full "Carmack" liability for loss and damage on:

> "property ... with respect to which the Interstate Commerce Commission has fixed or authorized affirmatively at a rate dependent upon value, either an agreed or released value" (Senate Rep. No. 394, 64th Cong., 1st Sess., p. 2).

In regard to released rates and inadvertence clauses, it is therefore incorrect to state, as Petitioners do, that the Interstate Commerce Act codifies the law as set forth in Hart v. Pennsylvania R.R., 112 U.S. 331 (1884), (Pet. For Cert. p. 4). Clearly Hart was superceded by the subsequent legislation i.e., the Carmack Amendment (Act of June 29, 1906, Ch. 3591, §7, 34 STAT. 595), the First Cummins Amendment (Act of March 4, 1915, 38 STAT. 1196) and the Second Cummins Amendment supra.

Decisions spanning almost three-quarters of a century since the enactment of the Second Cummins Amendment, recognize the I.C.C.'s broad discretion in this area. In Southern Railway Co. v. United States, 194 F. Supp. 633, 638 (1961), the United States District Court for the Eastern District of Virginia summarized the pertinent legislation explaining:

> Epitomized, the legislative history of the released rates is this: in 1906 the Congress barred the total exemption of a carrier from liability; in 1915 Congress tolerated released rates conditionally; in 1916 Congress approved all released rates which had theretofore been allowed by the Commission and left the whole problem thereafter to the discretion of the Commission. (emphasis added) (194 F. Supp. at p. 638)

See also American Ry. Express Co. v. Lindenberg, 260 U.S. 584 (1923), National Motor Freight Traffic Association v. I.C.C., 590 F. 2d 1180, 1185 (1978); Shippers National Freight Claim Council v. I.C.C., 712 F. 2d 740, 749 (1983).

In its decision, the Third Circuit cited Drug & Toilet Preparation Traffic Conf., Inc. v. United States, 797 F. 2d 1054, 1058 (D.C. Cir. 1986) as authority for its conclusion that in denying the petitioner's complaint, the Commission had acted in accord with its delegated "function of filling in the gaps of Congressional authorization:" (Citing, Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984) (Pet. App. pp. 9, 12)

Finally, in its decision under review, the Third Circuit, citing 49 U.S.C. §10762, points out that Congress has delegated to the I.C.C. very broad discretion in regard to tariffs. Indeed, §10762(d)(1) gives the Commission virtually carte blanche to change its requirements regarding released rates inadvertence clauses or virtually any other tariff provisions, "if cause exists in particular instances or as they apply in special circumstances."

Contrary to Petitioners (see Pet. For Cert. pp. 11, 12), the application of the inadvertence clause is not based upon the theory of a "constructive agreement" between the shipper and carrier. Rather, as previously indicated, the Commission and the Courts have found that, when taken together, the carrier's tariff and bill of lading constitute an actual agreement. As indicated, the contract of carriage (the bill of lading) makes clear reference to the carrier's tariffs which contain the applicable inadvertence clauses and shippers are charged with notice of the tariff terms and conditions -- including those affecting liability. (See Drug & Toilet Preparation Traffic Conf. v. U.S., Supra, at 1061). Therefore, the shipper who signs the bill of lading has agreed to the carrier's applicable tariff provisions -- including the inadvertence clause.

In view of the foregoing, it is clear that the Interstate Commerce Commission has well established authority to permit inadvertence clauses to be included within the tariffs of carriers subject to its jurisdiction.

III. RECENT CASES HAVE UPHELD THE INADVERTENCE CLAUSE

In recent years, there have been a number of cases in which the application of inadvertence clauses has been challenged. The clear weight of precedent is represented by cases such as W.C. Smith, Inc. v. Yellow Freight System, Inc., 596 F Supp. 515 (U.S.D.C. E.D. Pa. 1983). and Mechanical Technology

v. Ryder Truck Lines, Inc., 776 F. 2d 1085 (2d Cir. 1985), in which the inadvertence clause was held enforceable based upon the written agreement requirement being satisfied by the bill of lading together with the carrier's tariffs.

In Mechanical Technology, supra, the inadvertence clause of item 116032 of the National Motor Freight Classification (NMFC) (applicable on computers and computer components) was upheld in the absence of a specific release signed by the shipper. The Court found that the shipper was sophisticated in transportation matters and that knowledge of the tariff must be imputed to it. Consequently, when the shipper left blank the space on the bill of lading which was provided for declaring the released value of the goods, it did so with full knowledge of the consequences under the applicable tariff.

Mechanical Technology, supra has been cited as authority for a number of other decisions enforcing the inadvertence clause. These include: Digital Equipment Corporation v. Salvage Discount, Inc., No. 87-442-G (M.D. NC. 1988) (Attached to NMFTA's Brief to the Third Circuit as Appendix E) and Great American Insurance Co. v. ANR Freight System, Inc., No. 88-0466 MHP (N.D. CA. 1989).

IV. THE COURTS HAVE UPHELD INADVERTENCE CLAUSES EVEN WITHOUT RECOGNIZING THAT THESE CLAUSES WERE AUTHORIZED BY THE I.C.C.

From a review of the relevant precedent set forth in the previous section, it is apparent that the cited cases focus largely on the enforceability of the involved inadvertence clauses -- particularly item 116032 of the National Motor Freight Classification, which is applicable to shipments of computers and computer components.7/ NMFC items 116030 and 116032 are perhaps the most litigated of all motor carrier released rates/inadvertence clause provisions and, indeed, they were prominently mentioned and

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7 Prior to the Motor Carrier Act of 1980 [49 U.S.C. 10706(b)], in order for a carrier to obtain authority to limit its liability, it was necessary to file an application with the I.C.C.'s Released Rates Board. A notice of the released rate application was then published in the Federal Register so that all interested parties could appear and make known their views regarding the pertinent issues.

This usual procedure was followed by the NMFTA in applying for released rates authority for many commodities on behalf of its member carriers - including Released Rates Order No. 894, which authorized the provisions of National Motor Freight Classification items 116030 and 116032 embracing computer or data processing equipment. (See NMFTA's Appendix A hereto for reproduction of items 116030, 116032 and an identification of various released rates items containing inadvertence clauses which are presently included in the motor carrier tariff published by the NMFTA i.e., the National Motor Freight Classification.

interpreted in the decisions of both the I.C.C. and the Third Circuit which are at issue herein.8/ Further, items 116030 and 116032 became the model for many

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7 The decisions of the Commission and the Third Circuit specifically recognize that in Machines, Data Processing, Classification Ratings, 353 I.C.C. 661 (1977), the proceeding before the ICC's Released Rates Board concerning the NMFTA's application on computer products, there were a number of shipper parties, including the petitioners herein, who wholeheartedly supported the proposed provisions and raised no objection to the included inadvertence clause.

Now the petitioners have taken a position which is diametrically opposed to the position they took with respect to the Machines, supra proceeding which resulted in Released Rates Order No. 894. They now seek to have stricken certain portions of the very provision which was established, in part, on the basis of their support.

Petitioners argue (Pet. For Cert. at pp. 14-15) that the inadvertence clause was not at issue in Machines supra. Petitioners' allegation is completely false. The released rates application filed by the National Motor Freight Traffic Association specifically included the inadvertence clause In fact, as an accommodation to the supporting shippers, the clause is somewhat unusual in that it makes the lowest rather than the highest valuation applicable. The reason it was not prominently mentioned in the discussion portion of the decision is that the shippers -- including petitioners herein -- raised no objection to it.

8 While the complaint was directed to certain tariff provisions of 10 named carriers, it also included all similar or comparable inadvertence clauses maintained on their behalf, such as those maintained in the National Motor Freight Classification.

other released rates provisions -- including item 3010-C of Roadway Express Tariff 301-C, "Used Machinery and Agricultural Implements," which appeared in petitioner's original complaint as well as in the decisions of the I.C.C. and the Third Circuit. (See Pet. App. pp. A-3, B-3)

Unfortunately, the course of litigation in many cases involving released rates has been altered as a result of an unfortunate accident. The specific authorization for the inadvertence clause in NMFC item 116032 (computers and computer components) was mistakenly omitted from the original decision which was printed in the I.C.C. Reporter, 353 I.C.C. 661 (1977) because of its importance to the transportation industry.9/ The part of the decision specifically authorizing the inadvertence clause was published 10 days later in a separate decision which was never printed in the I.C.C. Reporter.

Inasmuch as NMFC item 116032 was the inadvertence clause at issue in Mechanical Technology, supra, Digital Equipment Corporation, supra and Great American Insurance Co., supra, the courts, not knowing that the inadvertence clause had been specifically authorized by decision of the I.C.C., were obliged to decide the case solely on the basis of the "sophisticated" shipper being "charge with notice of the terms, conditions, and regulations contained in the tariff schedule."

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9 Few released rates decisions are printed in the I.C.C. Reporter.

The recent line of decisions is, however, important to the instant proceeding inasmuch as it manifests recognition, by a number of courts, of the principle that the shipper can be properly charged with knowledge of the provisions under which it ships -- including the inadvertence clause.

Petitioners place great reliance in the holding of General Electric Co. v. McLean Trucking Co., Civil No. 85-417-A (E.C. Va 1985) (GE), that "under §11707(C)(1) & (4) 'the carrier's attempt to get a liability limit by tariff was void unless there was compliance with §10730'". A review of GE will reveal that it was wrongly decided. Although the principal issue in GE was the enforceability of the involved inadvertence clause (item 160080 of Eastern Central Motor Carrier's Association Tariff, 534 ICC ECA 534), the Court was not advised of a single case such as W.C. Smith, Inc. v. Yellow Freight System,Inc. supra) in which an inadvertence clause was upheld. Instead, citing Gordon H. Mooney Ltd. v. Farrell Lines, Inc., 616 F. 2d 619, 626 (2d Cir. 1980); Mass v. Broswell Motor Freight Lines, Inc., 577 F. 2d 665 (9th Cir. 1978); Anton v. Greyhound Van Lines, Inc., 591 F. 2d 103 (1st Cir. 1978); and Catin v. Salt City Movers & Storage Co., 149 F. 2d 428 (2d Cir. 1945), the Court stated as justification for its decision:

> "Every case brought to the court's attention has, under circumstances similar to those found here, declined to give the tariffs effect in the face of 49 U.S.C. §§10730, 11707." [See Slip opinion p. 8 Appendix G hereto]

Unfortunately not one of the cases cited by the Court focused on enforceability or the validity of an inadvertence clause. And yet, these cases were cited as the reason the involved inadvertence clause in item 160080 could not be upheld.

The Petitioners make precisely the same mistake in citing the very same cases which were referenced by the court in GE.

Contrary to the allegation of the Shipper Conferences, the Commission was clearly correct in stating that there was a "virtually unbroken string of decisions upholding the inadvertence clauses in tariffs." The cases cited by the Shipper Conferences do not concern inadvertence clauses and, are therefore, irrelevant to the issues of this proceeding.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
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April 6, 1990

APPENDIX A

A LISTING OF RELEASED RATES ITEMS CONTAINING INADVERTENCE CLAUSES WHICH APPEAR IN THE NATIONAL MOTOR FREIGHT CLASSIFICATION - ALL OF THESE ITEMS WERE PUBLISHED PURSUANT TO A SPECIFIC RELEASED RATES ORDER OF THE I.C.C. - ITEMS CONTAINING INADVERTENCE CLAUSES INCLUDE THE RELEASED RATES ORDER NUMBER AND DATE OF THAT ORDER

ITEM	ARTICLES	RELEASED RATES ORDER
62820	Radio, Radio-telephone or Television Transmitting and Receiving Sets, or other Radio Impulse or Wireless Audio (Sound) Impulse Transmitting or Transmitting and Receiving sets	Order No. MC-597 Dec. 24, 1964
62822	Inadvertence clause	
63025	Semi-conductors	Order No. MC-529
63031	Inadvertence clause	March 21, 1963
70080	Flatware, Dresserware or Holloware	Order No. MC-525
70082	Inadvertence clause	Dec. 17, 1962
88140	Glassware	Order No. MC-607
88143	Inadvertence clause	April 15, 1965
99400	Hides, Pelts or Skins	Order No. MC-519
99402	Inadvertence clause	Oct. 12, 1962
107830	Jewelry	Order No. MC-455
107834	Inadvertence clause	Aug. 17, 1960
116030	Machines, Systems or Devices	Order No. MC-894
116032	Inadvertence clause	May 10, 1977
120800	Engines	Order No MC-296
120844	Inadvertence clause	Feb. 23, 1949
136500	Metal, NOI, or Metal Alloys, NOI	Order No. MC-439
136516	Inadvertence clause	April 7, 1959
164900	Radioactive Materials, Articles or Isotopes	Order No. MC-558
164906	Inadvertence clause	Jan. 27, 1964
196420	Watches or Watch Movements	Order No. MC-615
196420 sub 3	Inadvertence clause	June 7, 1965

ITEMS 116030 AND 116032 -
MACHINES, SYSTEMS OR DEVICES
(REPRODUCED IN FULL)

NATIONAL MOTOR FREIGHT CLASSIFICATION

ARTICLES		CLASSES		
Item		LTL	TL	MW
116030	Machines, systems or Devices, data processing, or units that form components of data processing machines, systems or devices, in boxes or Packages 2254 or 2373 or when weighing each not in excess of 1,600 pounds, in wireboard rates, or Parts thereof, NOI, in boxes or Packages 2253 or 2373; or Electronic Telephone Switching Systems or components for such systems, in boxes or crates, see Notes, items 61483 and 63242 or in Packages 1027, 2050, 2286 and 2291; see Note, item 116032:			
Sub 1	Released to a value not exceeding $5.00 per pound.....	92.5	55	24
Sub 2	Released to a value exceeding $5.00 per pound but not exceeding $10.00 per pound.....	150	92.5	20
Sub 3	Released to a value exceeding $10.00 per pound but not exceeding $25.00 per pound.....	250	125	20
116032	NOTE--The released or declared value of the property must be entered on the shipping order and bill of lading at time of shipment in the following form: 'The agreed or declared value of the property is hereby state by the shipper to be not exceeding $_____ per pound.' If the shipper fails or declines to execute the above statement or designates a value exceeding $25.00 per pound, shipment will not be accepted, but if shipment is inadvertently accepted, it will be considered as being released to a value of $5.00 per pound and the shipment will move subject to such limitation of liability. (The released values upon which the classes herein are dependent have been authorized by the Interstate Commerce Commission by Released Rate Order No. MC-894 of May 10, 1977, as amended August 10, 1979 and January 7, 1983, subject to complaint or suspension.)			